

Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996). (This is a GIL.)

January 11, 2005

Dear Xxxxx:

This letter is in response to your letter dated November 15, 2004, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We wish to obtain a Ruling on behalf of ABC regarding the interpretation of nexus requirements in the state of Illinois as those requirements pertain to agency relationships. As such, we respectfully submit the following issue for your review and guidance:

Facts:

ABC is a STATE1 corporation engaged in the sale of nutritional supplements via a website accessible through the Internet. All sales are made via this website as ABC maintains no sales force.

The ABC website is maintained on a server located in STATE2. All design, implementation, support, maintenance, and administrative services associated with the ABC website are performed in STATE2.

ABC is considering entering into an Affiliate Agreement with various retailers who themselves maintain websites accessible through the Internet. One or more of these retailers has a physical presence in Illinois by virtue of servers they themselves maintain in the state. (Affiliate retailers will be referred to as 'Affiliate Partners' henceforth throughout this Ruling request.)

Under the proposed Affiliate Agreement, an internet 'Link' will be established between the Affiliate Partner website and the ABC website. An internet Link is a graphic or textual hyperlink. When placed on the Affiliate Partner website and 'selected' by a user of the Affiliate Partner website, an internet Link establishes a direct connection from the Affiliate Partner website to the ABC website. These links contain technology provided by ABC which allows ABC to track sales generated by the 'Linked User' on the ABC website.

A 'Linked User' is a user of the Affiliate Partner website who connects directly to the ABC website through a Link and, prior to terminating an active browsing session with the ABC website, makes a purchase using the check-out process located within the ABC website.

ABC will pay the Affiliate Partner a commission for purchases made on the ABC website by Linked Users.

ABC will be solely responsible for approving and processing every order placed by a Linked User. In addition, ABC will be responsible for order entry, payment processing, shipping, cancellations, returns, and related customer service for such ABC product sales. Delivery will take place via the U.S. Postal Service. All of the activities indicated above will occur at an ABC warehouse and fulfillment facility in the state of Texas.

ABC has no physical presence in Illinois aside from the relationship established via the proposed Affiliate Agreement described above.

Issue Statement:

It is our understanding that Affiliate Partners located in Illinois may have nexus in Illinois by virtue of the physical presence of the Affiliate Partners' computer servers maintained in the state. However, we are unclear as to ABC's status in this regard. We therefore request a Ruling on the following issues:

1. Does ABC achieve nexus in Illinois for sales and use tax purposes by virtue of an agency relationship with Affiliate Partners?
2. Does ABC achieve nexus in Illinois for income/franchise tax purposes by virtue of an agency relationship with Affiliate Partners?

If you require additional information or clarification of any part of this letter, please contact me directly.

Responses to this request may be sent via fax, via e-mail to the e-mail address indicated above, or via mail

DEPARTMENT'S RESPONSE:

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in

determining whether your company would be considered “a retailer maintaining a place of business in Illinois” subject to Use Tax collection obligations.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient “nexus” with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An “Illinois Retailer” is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the out-of State Retailer maintaining a place of business in Illinois. The definition of a “retailer maintaining a place of business in Illinois” is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a two-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis will trigger Use Tax collection responsibilities. See *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State.

Sales of tangible personal property made in Illinois and delivered to purchasers in Illinois are subject to Retailers' Occupation Tax and any applicable local taxes. This is the case for sales in which the purchase order is accepted in Illinois. This could include sales made while at trade shows. If purchases orders placed by customers through mail order or the Internet are accepted in Illinois, they, too, are subject to Retailers' Occupation Tax and applicable local taxes. See 86 Ill. Adm. Code 130.605.

Persons considered being “retailers maintaining a place of business” because of their Illinois activities are required to collect Use Tax on sales made to all Illinois purchasers regardless of the

manner in which the orders are placed. For instance, a “retailer maintaining a place of business in Illinois” will be required to collect Use Tax on all his sales to Illinois purchasers, regardless of whether those sales are placed by mail order, telephone order or over the Internet.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department’s Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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